denying access to the high-capacity loop/dedicated access combination, the Commission cannot require that ILECs provide combinations of UNEs if the individual components of those combinations should not themselves be subject to mandatory unbundling, as is the case here.[61]

III. MANDATING ACCESS TO UNE COMBINATIONS FOR THE PROVISION OF SPECIAL ACCESS AND PRIVATE LINE SERVICES WOULD UNDERMINE CRITICAL STATUTORY GOALS.

Even if the Commission determined, contrary to all the evidence, that competitors would be impaired without access to unbundled loop/transport combinations, it still should decline to mandate access to such facilities. As the UNE Remand Order recognized, the Commission must consider how unbundling particular elements would serve such vital statutory goals as encouraging facilities-based competition, providing certainty in the marketplace, and fostering innovation and investment by both incumbent and competitive LECs.[62] Mandating the availability of high-capacity loop/transport combinations for the provision of access and private line services would make a mockery of the Act's pro-competitive, deregulatory imperative and undermine each of these goals. Accordingly, under its Section 251(c)(3) authority to impose "just, reasonable, and nondiscriminatory conditions" on the use of UNEs, its Section 251(g) authority to protect the access charge regime, and its Section 4(i) authority to take actions

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[61] As explained in the Joint Petition, the Commission's earlier conclusions with regard to high-capacity loops and dedicated transport appeared to rest on undifferentiated market analyses (that is, extending conclusions relating to the provisions of mass market local exchange services to services provided to high-end business customers) and a factual misunderstanding of the ILECs' transport networks. Regardless of these shortcomings, the Joint Petition demonstrates that marketplace changes in the past two years establish that requesting carriers would not be impaired without access to unbundled high-capacity loops or dedicated transport.

[62] UNE Remand Order, ¶¶ 103-105, 110.

necessary to further the goals of the Act, the Commission should reject mandatory access to loop/transport combinations even if it believes that such combinations satisfy Section 251(d)(2).

Facilities-based competition. By slashing prices in the special access market, UNE-based special access would "undercut the market position of many facilities-based competitive access providers,"[63] as several facilities-based CLECs warned the last time the Commission considered this issue.[64] Over the past fifteen years or so, hundreds of competitors have invested billions of dollars in their own competitive special access and private line facilities, and a multitude of other companies have built facilities that they provide to other carriers on a wholesale basis. Those investments would be gravely devalued if special access rates were subject to an instantaneous and substantial discount.

This would stand the whole point of UNE-based competition on its head. "The purchase of unbundled network elements from the incumbent should serve as a transitional strategy that will provide requesting carriers with the ability to gain a sufficient volume of business to justify economical deployment of their own facilities."[65] Where competitors already have deployed their own facilities, and continue to do so, forced access to UNEs would be regressive, punishing rather than promoting additional facilities-based competition. This unquestionably would harm consumers, who "benefit when carriers invest in their own facilities because such carriers can

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[63] Supplemental Order Clarification, ¶ 18.

[64] *See* Comments of Time Warner, CC Docket No. 96-98, filed Jan. 19, 2000, at 19 (pricing special access at TELRIC "would substantially reduce [Time Warner's] incentive to expand its entry in the 21 markets it has already entered or to invest in network facilities in new geographic areas"); Joint ex parte of Allegiance, Intermedia, Time Warner, and Bell Atlantic, CC Docket No. 96-98, filed Sept. 2, 1999.

[65] UNE Remand Order, ¶ 52.

exercise greater control over their networks, thereby promoting the availability of new products and differentiating their services in terms of price and quality."[66]

Even more seriously, competitors would have no incentive to invest another dime in their networks, because they could not match the uneconomically low rates mandated by the TELRIC pricing regime. TELRIC-based rates, after all, are supposed to reflect the costs that would be incurred by a hypothetical, maximally efficient competitor. An IXC would have no reason to buy special access from a CLEC when it could obtain the same service from an ILEC at a substantial discount. Consequently, no CLEC could hope to recover its investment if ILECs were forced to charge such artificially low rates for competitive services.

The Commission, of course, fully recognizes this. In declining to require ILECs to provide unbundled access to their packet switches (with limited exceptions), the Commission explained that it was seeking not to deter investment:

> Despite the encouraging signs of investment in facilities used to provide advanced services ... regulatory action should not alter the successful deployment of advanced services that has occurred to date. Our decision to decline to unbundle packet switching therefore reflects our concern that we not stifle burgeoning competition in the advanced service market. We are mindful that, in such a dynamic and evolving market, regulatory restraint on our part may be the most prudent course of action in order to further the Act's goal of encouraging facilities-based investment and innovation.[67]

In light of the evidence discussed in Section II, that same conclusion must be reached with respect to high-capacity loop/dedicated transport combinations.

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[66] UNE Remand Order, ¶ 110.

[67] UNE Remand Order, ¶ 316. *See also* R. May, "Animal Advice," *Legal Times*, March 5, 2001, at 62 (suggesting that "the FCC has exhibited an irrational exuberance for retaining excessive regulatory control over the process of transitioning to a competitive environment" and urging the Commission to scale back its unbundling requirements).

Deployment of advanced services. Mandating the availability of UNE combinations to provide special access and private line services would undermine the ILECs' ability to continue offering high-quality, innovative services. Such a decision immediately would place several billion dollars in ILEC revenues at risk nationwide.[68] While loss of revenues is a constant threat in competitive markets, this shortfall would not result from aggressive competition by new entrants.[69] Rather, it would stem from a regulatory decision, divorced from marketplace realities, to impose a new and arbitrary pricing scheme on a market where rates already are competitively determined. Faced with a revenue drain of this magnitude, ILECs could not maintain their current pace of investing in broadband facilities, developing new services, and upgrading service quality and availability – particularly in rural areas where the prospective returns already are more speculative. In fact, since revenues from special access and private line services recover overhead costs that are excluded from TELRIC-based rates, such mandatory access to UNE combinations would place tremendous pressure on residential telephone rates.

Innovation. The incentive and ability to innovate is inextricably linked with investment. Innovation, as Chairman Powell has recognized, can be even more important than price competition because it enables transformational changes in our economy.[70] George Gilder

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[68] *See* Comments of SBC Communications Inc., CC Docket No. 96-98, filed Jan. 19, 2000, at 16-17; 2000 Special Access Report at 13 & Tables 8, 9.

[69] Nor would the loss of revenues be gradual, as is generally the case when due to competitive inroads; it would be immediate and therefore even more devastating.

[70] Remarks of Michael K. Powell before the Progress & Freedom Foundation, "The Great Digital Broadband Migration," Dec. 8, 2000 ("Powell Remarks"). *See also* Opening Statement of Michael K. Powell before the Subcommittee on Telecommunications and the Internet of the House Committee on Energy and Commerce, March 29, 2001 ("We will redirect our focus onto innovation and investment. The conditions for experimentation and change and the flow of

(Continued...)

recently seconded this point, explaining that "[w]hen it comes to leading-edge services and technologies, narrow price competition is almost meaningless. Internet innovation means qualitative change, order-of-magnitude price reductions and constantly changing services ...."[71] To promote innovation, the Commission must avoid "intrusions and distortions from inapt regulation" and "be careful to see speculative fear and uncertainty in this innovation-driven space for what it is, and not prematurely conclude we are seeing a market failure ...."[72]

Deregulation. The Act mandates a policy framework under which competition goes hand-in-hand with deregulation. The Commission has recognized this by instituting a process under which ILECs can secure pricing flexibility based on the attainment of certain competitive triggers. Indeed, as noted above, the Commission recently has granted several pricing flexibility petitions that effectively eliminate rate regulation for MSAs generating a significant portion of special access revenues. Compelling access to UNE combinations for the provision of special access and private line services perversely would subject the most competitive portion of the local exchange market to the most extreme regulation and undermine these deregulatory initiatives. Rather than permitting special access rates to continue to be competitively disciplined, the Commission would impose a far more stringent scheme of rate regulation than

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(...Continued)
money to support new ventures have often been misunderstood or neglected. If the infrastructure is never invented, is never deployed, or lacks economic viability we will not see even a glimmer of the bright future we envision").

[71] G. Gilder and B. Swanson, "The Broadband Economy Needs a Hero," *Wall St. J.*, Feb. 23, 2001, at A14 ("Gilder").

[72] Powell Remarks, *supra*.

was applied when the ILECs were the sole source of these services. Doing so would be indisputably arbitrary.

* * *

Permitting requesting carriers to substitute high-capacity loop/transport combinations for access and private line services would violate both the Act and its critical underlying goals. To preserve and promote true competition, the Commission promptly should state that ILECs need not make such combinations available.

IV. CARRIERS SHOULD NOT BE PERMITTED TO COMMINGLE UNES WITH ACCESS SERVICES.

The Public Notice asks whether carriers should be permitted to "combine unbundled network elements with tariffed access services that they purchase from the incumbent LECs."[73] By way of background, certain IXCs contend that they should be permitted to combine converted UNEs (presumably used for local traffic) and special access services onto the same DS3 access circuits, with some DS-1s on the DS-3 priced at TELRIC rates while other DS-1s are priced at tariffed rates. This practice should continue to be prohibited.[74] As the Commission found in the

[73] Public Notice at 3; *see also* Supplemental Order Clarification, ¶ 28. Of course, if the Commission grants the Joint Petition, commingling would no longer be an issue since high-capacity loops and dedicated transport would not be mandatory UNEs.

[74] To the extent some competitors want to combine UNE loops with access transport services without repricing the access portion, that practice should be prohibited on the same grounds: it inevitably would lead to bypass of special access. Certainly, at a minimum, competing carriers cannot connect UNEs to access services where ILECs do not do so in their own networks. Iowa Util. Bd. v. FCC, 120 F.3d 753, 813 (8th Cir. 1997).

Supplemental Order Clarification, it inevitably would "lead to the use of unbundled network elements by IXCs solely or primarily to bypass special access services."[75]

Permitting this practice also would require creation of an entirely new UNE – individual channels on a DS-1 or DS-3 – for which the Commission has never performed an impairment analysis. It is highly questionable under the Administrative Procedures Act whether the Commission could create such a requirement here based on the Public Notice. The Commission has neither defined the individual channels of a DS-3 or DS-1 as separate UNEs, nor has it proposed to do so. And, even if it had, a separate impair analysis would be required.

Moreover, creating a UNE out of such channels would eradicate the statutory distinctions between UNEs and resale: the individual-channels-on-a-DS3 "UNE," for example, would not enable the requesting carrier to "distinguish" its services from the ILEC's or "package and market services in ways that differ from the incumbent's existing service offerings" and would not cause the requesting carrier to incur "greater risks."[76] It would be nothing more than a re-pricing of the ILEC's tariffed DS3 access charge – that is, discounted resale of an access service, which violates Sections 251(c)(4) and 251(g) of the Act.[77]

In addition, there is no current way to provision a DS-3 that is partially a service and partially a UNE. Consistent with the differences in the products, Verizon and SBC have separate organizations and responsibilities for servicing an maintaining special access services and UNEs. A UNE purchaser has testing and other "virtual network" responsibilities. In contrast, the ILECs

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[75] *Id.*

[76] *See* Local Competition First Report and Order, ¶¶ 332-34.

[77] *Id.*, ¶ 333.

have those responsibilities for their special access services. Any service issues on a such a circuit would raise a serious threshold problem of determining whether the ILEC or the CLEC had responsibility. In addition, even within the ILEC, service on that circuit would require coordination between the separate service organizations, injecting additional delay and confusion.

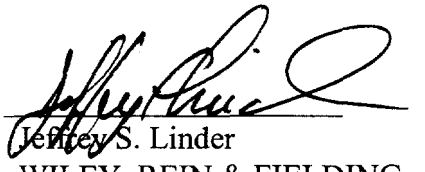
Finally, the ban on combining UNEs with access service is consistent with the Act and sound policy. The Public Notice asks whether ILECs should be required to allow commingling of unbundled loops and loop-transport combinations by competitive carriers if they do so in their own networks, implying that failure to do so might be discriminatory. Any such implication, however, is unwarranted. ILECs do not combine unbundled elements and services; rather, they may use the same interoffice facilities to carry both local and access traffic. Any other carrier is free to do the same. There is no prohibition on a CLEC's placing both local and access traffic on an ILEC's interoffice facilities – for example, a CLEC is free to multiplex DS1 circuits onto a DS3, where both circuits are procured out of the ILEC's access tariff. A CLEC also may combine loop facilities with another CLEC's interoffice circuits (which, as explained in Section II, are available wherever there is significant special access demand). What it may not do is engage in arbitrage of special access by paying UNE rather than access rates for the DS1 and selected channels on the DS3.

V. CONCLUSION

The Act and sound public policy require the Commission to hold that ILECs need not make combinations of high-capacity loops and dedicated transport available to requesting carriers. The Commission also should bar the commingling of UNEs and access services.

Respectfully submitted,

SBC AND VERIZON

By: 

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April 5, 2001

Attachment A:
SBC Telephone Companies

Illinois Bell Telephone Company
Indiana Bell Telephone Company, Incorporated
Michigan Bell Telephone Company
Nevada Bell Telephone Company
Pacific Bell Telephone Company
Southwestern Bell Telephone Company
The Ohio Bell Telephone Company
The Southern New England Telephone Company
The Woodbury Telephone Company
Wisconsin Bell, Inc.

Attachment B:
Verizon Telephone Companies

Contel of the South, Inc. d/b/a Verizon South Systems
GTE Midwest Incorporated d/b/a Verizon Midwest
GTE Southwest Incorporated d/b/a Verizon Southwest
The Micronesian Telecommunications Corporation
Verizon California Inc.
Verizon Delaware Inc.
Verizon Florida Inc.
Verizon Hawaii Inc.
Verizon Maryland Inc.
Verizon New England Inc.
Verizon New Jersey Inc.
Verizon New York Inc.
Verizon North Inc.
Verizon Northwest Inc.
Verizon Pennsylvania Inc.
Verizon South Inc.
Verizon Virginia Inc.
Verizon Washington, DC Inc.
Verizon West Coast Inc.
Verizon West Virginia Inc.

ATTACHMENT C:
JOINT PETITION OF BELLSOUTH, SBC, AND VERIZON
FOR ELIMINATION OF MANDATORY UNBUNDLING OF
HIGH-CAPACITY LOOPS AND DEDICATED TRANSPORT

ORIGINAL

Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, D.C. 20554

In the Matter of:	)	
	)	
Implementation of the Local Competition Provisions of the Telecommunications Act of 1996	)	CC Docket No. 96-98
	)	
	)	
Joint Petition of BellSouth, SBC, and Verizon for Elimination of Mandatory Unbundling of High-Capacity Loops and Dedicated Transport	)	CC Docket No. 01-__

JOINT PETITION

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Joint Petition of BellSouth, SBC, and Verizon for Elimination of Mandatory Unbundling of High-Capacity Loops and Dedicated Transport	)	CC Docket No. 01-__

JOINT PETITION

BellSouth Corporation and BellSouth Telecommunications, Inc. (collectively "BellSouth"), SBC Communications, Inc. ("SBC"), and the Verizon Telephone Companies ("Verizon" (together the "Joint Petitioners") ask the Commission to find that high-capacity loops[1] and dedicated transport[2] should not be subject to mandatory unbundling.[3] As shown below and in the attached Fact Report,[4] there are ample alternatives for these elements available outside the ILECs' networks. This "marketplace evidence," which the Commission properly

[1] The Joint Petitioners use the term, "high-capacity loops," to refer to circuits at a level of DS-1 or higher.

[2] "Dedicated transport" is defined in Section 51.319(d)(1)(i) of the Commission's Rules. The Joint Petitioners use the term here to include both the transport architectures described in that Rule and dark fiber transport, as defined in 47 C.F.R. § 51.319(d)(1)(ii).

[3] The Joint Petitioners are filing this Petition on behalf of their respective local telephone companies, which are listed in Attachment A hereto.

[4] "Competition for Special Access Service, High-Capacity Loops, and Interoffice Transport," April 5, 2001 ("Fact Report") (Attachment B hereto).

considers "the most persuasive evidence of the actual availability of alternatives as a practical, economic, and operational matter,"[5] conclusively demonstrates that requesting carriers would not be impaired if access to these elements were denied. To assure compliance with Section 251(d)(2), advance the Act's and the Commission's pro-competitive, deregulatory goals, and promote the deployment of advanced telecommunications capabilities, the Joint Petition should be granted expeditiously.

I. INTRODUCTION AND SUMMARY

In September 1999, based on data that are now more than two years old, the Commission ordered ILECs to provide unbundled access to several network elements, including high-capacity loops and dedicated transport. In doing so, the Commission recognized that competitors were deploying their own loop and transport facilities, but concluded that alternatives outside the ILEC's network were not yet available in a ubiquitous, timely, and cost-effective manner. Nonetheless, the Commission pointedly stated that "[t]he purchase of unbundled network elements from the incumbent should serve as a transitional strategy that will provide requesting carriers with the ability to gain a sufficient volume of business to justify economical deployment of their own facilities."[6]

The Joint Petitioners disagree with the conclusions regarding high-capacity loops and dedicated transport in the UNE Remand Order but do not challenge them here. Rather, as demonstrated herein, even if those findings were valid when made, they are not valid any longer.

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[5] Implementation of the Local Competition Provisions of the Telecommunications Act of 1996, 15 FCC Rcd 3696 (1999) (¶ 66) ("UNE Remand Order").

[6] *Id.*, ¶ 52.

For high-capacity loops and dedicated transport, the transition from UNE-based competition to facilities-based competition is over.

In the past two years (only a bit less than the period between passage of the Act and the compiling of the record in the UNE Remand proceeding), competitive loop and transport facilities have proliferated dramatically, to the point where they are available wherever there is likely to be significant demand for them. In mid-1999, CLECs had 160,000 local fiber miles; by year-end 2000 they had 218,000. In mid-1999, there were 486 local fiber networks in the top 150 MSAs (which account for 70 percent of the population and an even higher portion of revenues from high-capacity loop and dedicated transport services); by year-end 2000, there were 635. Many of these MSAs have anywhere from five to fourteen competing fiber networks, and seventy-seven of the top 100 MSAs now have at least three.

Notably, there is now a vibrant wholesale market for high-capacity loops and dedicated transport – what one analyst recently termed an "avalanche of metro capacity being deployed."[7] In large, medium-sized, and smaller markets, numerous companies provide scalable, cost-effective, and readily available capacity to new entrants – who, in turn, trumpet in press releases and SEC filings that they can "replace" or "eliminate" ILEC facilities. According to a coalition of these companies, its members "provide, or will provide, advanced fiber-transport services, including interoffice transport, and/or dark fiber to end users and other telecommunications

[7] Fact Report at 14, *citing* J. Grubman, Salomon Smith Barney, *Grubman's State of the Union*, at 15 (March 21, 2001). Notably, these facilities are not limited to cities. Where there are concentrations of demand outside urban areas, CLECs have generally put fiber there. *See* Fact Report at 12.

carriers ... in virtually every region of the 'lower 48' states and the District of Columbia."[8] The existence of such a wholesale market, as several CLECs have conceded, effectively precludes a finding of impairment.

The picture is equally impressive with respect to buildings served. CLECs routinely build out high-capacity loops to connect customers to their fiber networks, and not just in urban areas. The costs of doing so are economically reasonable, both because fiber costs have been decreasing and because the networks are built as close to likely customers as possible. Indeed, based on what is undoubtedly an overly conservative estimate, CLEC fiber now reaches at least 175,000 commercial buildings (approximately one out of every four commercial buildings in the country).[9] Since many of these buildings do not house customers using high-capacity services, the proportion of CLEC-served buildings housing business customers who are likely to subscribe to high-capacity services is much higher. Fixed wireless also has become a viable and oft-employed means of serving large business customers, either on a permanent basis or as a rapidly implemented and inexpensive transition until a fiber link is established.

Likewise, dedicated transport facilities are ubiquitously available wherever there is likely to be demand for them. Competitors (often multiple competitors) have collocated in the principal ILEC central offices serving customers of those services: out of the 320 MSAs served

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[8] Coalition of Competitive Fiber Providers, Petition for Declaratory Regarding Application of Sections 251(b)(4) and 224(f)(1) of the Communications Act of 1934, as Amended, to Central Office Facilities of Incumbent Local Exchange Carriers, CC Docket No. 01-77, filed March 15, 2001, at 1.

[9] In reality, the number of buildings served by non-ILEC providers is certain to be much higher; this figure does not include buildings served by all fiber-based CLECs and by non-CLEC fiber wholesalers or fixed wireless systems.

by the BOCs (including GTE), 183 have at least one fiber-based collocator in wire centers accounting for at least 30 percent of special access revenues in those MSAs. Those 183 MSAs include 42 of the top 50 in the country and generate approximately 80 percent of BOC special access revenues. Almost half (154) of the 320 BOC MSAs have fiber-based collocation in wire centers accounting for 65 percent of special access revenues in those MSAs. Those 154 MSAs include 33 of the top 50 and generate 64 percent of BOC special access revenues.[10] The Commission, affirmed by the D.C. Circuit, has found that such collocation is a reliable indicator of effective competition,[11] and these data confirm that entry is possible without UNE combinations in a broad range of geographic markets. Having concluded that competition is sufficiently vigorous (without reliance on UNEs) to allow prices to be deregulated, the Commission cannot turn a blind eye to that same competition here.

Moreover, competitors routinely add collocation sites both in ILEC central offices, and increasingly, in collocation "hotels" that interconnect with ILECs, CLECs, IXCs, ISPs, and commercial buildings. Indeed, the emergence of these "hotels" minimizes the need for collocation on ILEC premises. Even where collocation on the ILEC's premise is required, there are no material delays or expense: the Joint Petitioners alone now provide tens of thousands more collocation arrangements than they did two years ago and fill collocation requests in an average of less than 90 business days, and options such as cageless and shared collocation assure that even small entrants can efficiently collocate.

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[10] Fact Report at 6-7 & Tables 4-5.

[11] *See* WorldCom v. FCC, 238 F.2d 449, 459 (D.C.Cir. 2001) ("collocation can reasonably serve as a measure of competition in a given market and predictor of competitive constraints upon future ILEC behavior").

Given these marketplace developments, it is impossible to conclude that competitors are impaired without access to ILEC high-capacity loops and dedicated transport. Alternative facilities no longer are restricted to "limited point-to-point routes," as the Commission found in the UNE Remand Order. Twenty months later, they are virtually ubiquitous. The prevalence of these alternative facilities and the rapid pace at which they have been and continue to be deployed demonstrates incontrovertibly that CLECs are not impaired without access to high-capacity loop and dedicated transport UNEs. Consequently, mandating access to these elements would violate Section 251(d)(2) of the Act.

Even if the Commission somehow determined, notwithstanding the overwhelming evidence to the contrary, that competitors would be impaired without access to these UNEs, it still would be required to deny access in order to advance the core Congressional objectives of promoting facilities-based competition and deployment of advanced services. The very real social costs of unbundling these elements – in the form of diminished investment and restricted innovation – far outweigh any conceivable, marginal benefit from a requirement that these elements be unbundled.

First, as the Commission has recognized, overbroad unbundling requirements impede investment. They punish facilities-based new entrants by depriving them of market-based returns; they punish ILECs by forcing them to bear all the risks of new investments but share the rewards with competitors; and they punish consumers by deterring wider deployment of broadband facilities. A tremendous amount of new investment will be needed in the coming years to keep up with the rapidly growing demand for high-capacity services. In fact, the further development of the information economy depends on having an adequate supply of facilities to permit American businesses to take advantage of the opportunities that technology is making

available. Permitting the marketplace to operate unfettered by government-mandated sharing of facilities will assure that rational investments are made and resources are allocated as efficiently as possible. In contrast, "leveling the playing field" by requiring ILECs to provide high-capacity unbundled loops to their competitors at TELRIC-based rates (which prevent ILECs from earning returns commensurate with the risks of investing in such facilities and preclude CLECs from being able to price-compete) would co-opt the market and stifle investment incentives.

Indeed, particularly when broadband facilities are at stake, the impact of excessive unbundling on potential innovation is sobering: as George Gilder has warned, undue interference in the marketplace for broadband services risks denying consumers of all sizes the "qualitative change" and "order-of-magnitude price reductions" that innovation will bring. Moreover, as Chairman Powell recently testified, "If the infrastructure is never invented, is never deployed, or lacks economic viability we will not see even a glimmer of the bright future we envision."[12] To promote innovation, the Commission must avoid "intrusions and distortions from inapt regulation" and "be careful to see speculative fear and uncertainty in this innovation-driven space for what it is, and not prematurely conclude we are seeing a market failure ...."[13] As George Gilder recently cautioned, in discussing precisely the facilities at issue in this Petition:

> Hundreds of billions of dollars have already been invested by metropolitan fiber-optic network providers ... and optical service providers .... These companies are already rendering the metropolitan DSL debate moot with thousand-fold increases in price

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[12] Opening Statement of Michael K. Powell, Chairman, FCC, before the Subcommittee on Telecommunications and the Internet of the House Committee on Energy and Commerce, March 29, 2001, at 4.

[13] Remarks of Michael K. Powell before the Progress & Freedom Foundation, "The Great Digital Broadband Migration," Dec. 8, 2000 ("Powell Remarks").

> performance over existing technology. ... But none of these deployments ... can flourish under a regime of forced sharing of entrepreneurial assets and profits.[14]

Whatever the need for unbundling may have been at the time of the UNE Remand Order, it is abundantly clear that the "transition" envisioned by the Commission has concluded. To assure compliance with the Act and promote continued investment and innovation in the provision of broadband services and facilities, the Commission should promptly eliminate the requirement that ILECs provide access to unbundled high-capacity loops and dedicated transport.

II. HIGH-CAPACTY LOOPS AND DEDICATED TRANSPORT DO NOT MEET THE STATUTORY STANDARD FOR MANDATORY UNBUNDLING.

In *AT&T v. Iowa Utilities Board*, the Supreme Court held that "the Act requires the FCC to apply *some* limiting standard, rationally related to the goals of the Act,"[15] in conducting its impairment analysis under Section 251(d)(2).[16] In the *UNE Remand Order*, the Commission concluded that the impairment standard would be met if a requesting carrier would be "materially diminished" in its ability to provide service if, taking into account the possibility of self-provision or obtaining a substitute facility from a third-party, it was denied access to a particular

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[14] G. Gilder and B. Swanson, "The Broadband Economy Needs a Hero," *Wall St. J.*, Feb. 23, 2001, at A14 ("Gilder").

[15] AT&T v. Iowa Util. Bd., 119 S.Ct 721, 734-35 (1999).

[16] Section 251(d)(2) states that, "In determining what network elements should be made available ... the commission shall consider, at a minimum, whether (A) access to such network elements as are proprietary in nature is necessary; and (B) the failure to provide access to such network elements would impair the ability of the telecommunications carrier seeking access to provide the services that it seeks to offer." 47 U.S.C. § 251(d)(2).

UNE.[17] In undertaking this analysis, the Commission said it would look to any differences in cost, timeliness, ubiquity, quality, or impact on network operations between the UNE and non-ILEC alternatives.[18] It also emphasized that it would consider whether its rules "promote facilities-based competition."[19]

Based on data that are now more than two years old, the Commission determined that all loops and all forms of transport met the standard for unbundling. Whatever the merits of that conclusion may have been in September 1999, dramatic changes in the marketplace render them indefensible today. As detailed below, there can be no serious argument that the lack of access to ILEC high-capacity loops or dedicated transport would materially diminish competitors' ability to provide service.

A. Competitors Can Self-Supply High-Capacity Loops Or Obtain Such Facilities From Third Parties With No Material Diminution in Their Ability To Provide Service.

The *UNE Remand Order* acknowledged that, as of mid-1999, CLECs were beginning to deploy their own high-capacity loops to business customers.[20] The Commission also observed that "[l]arger business customers ... may generate sufficient revenue to allow the requesting carrier to serve the customer using self-provisioned facilities or facilities acquired from third-

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[17] *UNE Remand Order*, ¶ 51.

[18] *Id.*, ¶¶ 72-100. The Joint Petitioners believe that the analytical framework used for the impair analysis in the *UNE Remand Order* is inconsistent with the requirements of the 1996 Act, as interpreted by the Supreme Court in *AT&T v. Iowa Utilities Board*. Nevertheless, even under that framework, as shown below, high-capacity loops and dedicated transport should not be unbundled.

[19] *Id.*, ¶ 104.

party sources."[21] Nonetheless, the Commission determined that lack of access to the ILEC's high-capacity loops would impair competitors, asserting that "[b]uilding out any loop is expensive and time-consuming, regardless of its capacity,"[22] and that "access to these high-capacity lines is necessary for the ubiquitous deployment of high-capacity services ...."[23] As discussed below, developments in the market over the past twenty months require the Commission to reverse this conclusion.

1. Ubiquity

In the UNE Remand Order, the Commission essentially assumed that competing providers of high-capacity services to business customers would have to replicate the ILECs' existing networks of loops and switches. Based on this mistaken view, the Commission concluded that CLEC investments in fiber loops only served a few customers rather than being truly "ubiquitous." What the Commission failed to recognize is that "ubiquity," for services provided using high-capacity loops to business customers, means something very different than it does in the mass market for local exchange customers.

(...Continued)

[20] *UNE Remand Order*, ¶ 184 & n.342.

[21] *Id.*, ¶ 83; *see also id.*, ¶ 54 ("In some markets, particularly those markets serving high-volume business customers, it may be practical and economical for competitive LECs to compete using self-provisioned facilities").

[22] UNE Remand Order, ¶ 184.

[23] UNE Remand Order, ¶ 187.

Businesses using high-capacity services are highly concentrated in limited geographic areas.[24] For example, 80 percent of Verizon's special access revenues (a useful surrogate for the high-capacity market in general) are generated from 20 percent of its wire centers; 80 percent of SBC's special access revenues come from 25 percent of its wire centers, and 91 percent of BellSouth's revenues come from 20 percent of its wire centers.[25] As a result, a CLEC wishing to compete in the provision of these services can do so effectively through a targeted investment in fiber networks that address the few commercial buildings housing customers who have a need for high-capacity connections. Moreover, given the revenue base represented by these customers, such investments are both eminently rational and readily achievable.

Given an appropriate understanding of ubiquity in the context of high-capacity services provided to business customers, the marketplace evidence confirms that non-ILEC sources of high-capacity loops are ubiquitously available. First, the leading independent study of the CLEC industry reports that CLEC fiber today already serves at least 175,000 commercial office buildings, or approximately 25 percent of all commercial office buildings nationwide. The actual number of buildings served by fiber almost certainly is much higher, because the 175,000 figure is based on responses from only half the CLECs that reported having fiber networks and does not include the many thousands of buildings served by fiber wholesalers.[26] More importantly,

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[24] *See* Fact Report at 2-3 & Table 1 (explaining that customers of special access and other high-capacity services are overwhelmingly large businesses located in limited geographic areas).

[25] Fact Report at 3. Remarkably, a mere 6 percent of BellSouth's wire centers generate 62 percent of its special access revenues.

[26] *See* Fact Report at 11-12. Nor does the study include the thousands of buildings served by wireless CLECs, such as Winstar (which has presence in or rights to access 13,000 buildings in 60 markets). *See* Fact Report at 23-24.